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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~1004~~ 55

PETITION NOT PRINTED
RESPONSE NOT PRINTED
BRIEF NOT PRINTED

WILLIE WADE, JR., *Petitioner,*

v.

LAWRENCE E. WILSON, WARDEN, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 1084

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the United States District Court for the Northern District of California is reprinted at page 44 of the Appendix filed herewith. The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 390 F.2d 632, and is reprinted at page 50 of the Appendix filed herewith.

Statement of Jurisdiction

The decision of the United States Court of Appeals for the Ninth Circuit was rendered on March 11, 1968, and rehearing was denied on May 3, 1968. A petition for writ of certiorari was filed by the petitioner in this Court on June 17, 1968, and the petition was granted on February 24, 1969. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). See also, *Ex parte Tom Tong*, 108 U.S. 556.

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> "Section 1. • • •. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rules 10 and 35 of the California Rules of Court are set forth in Appendix A hereto.

Questions Presented

1. Whether the practice of the State of California in furnishing a free transcript for purpose of appeal to every defendant tried separately in a felony case (whether or not indigent, and irrespective of the penalty imposed) while denying a free transcript to an indigent tried as co-defen-

dant in a felony case unless one of the co-defendants is under sentence of death violates the Fourteenth Amendment to the Constitution of the United States?

2. Whether an indigent defendant who has been denied a free transcript for direct appeal of his conviction under the circumstances here presented must set forth in his federal habeas corpus petition grounds for invalidating his conviction before the Federal court can order that a transcript be furnished?

Statement of the Case

Nine years ago petitioner Wade and his co-defendant, Pollard, were convicted of first degree murder in the Superior Court in Los Angeles, California. In lieu of granting petitioner's motion for a new trial, the trial judge reduced the death penalty imposed upon petitioner to life imprisonment (A. 37). Petitioner and Pollard each filed a notice of appeal to the California District Court of Appeal for the Second Appellate District (A. 11, 18).

Had they been tried separately, under California law each would have been automatically furnished with a free transcript upon the filing of his notice of appeal. However, because they were co-defendants, separate transcripts were denied to petitioner and Pollard in accordance with Rules 10 and 35 of the California Rules of Court which provide that where two or more co-defendants appeal their felony convictions and none was sentenced to death only one copy of the transcript shall be made available for all appealing defendants "in such manner as the judge, or the

clerk under his direction, shall prescribe." (See Rules 10(c) and 35(c) in Appendix A to this Brief.)

The transcript was sent by the clerk of the trial court to Pollard, who had a claimed conflict of interest with petitioner, and refused thereafter to make the transcript available to petitioner although requested to do so (A. 18, 19). Pollard subsequently dismissed his appeal, but never made available to petitioner the transcript given to him by the court (A. 24). As a result, petitioner had no opportunity to review the transcript prior to the trial court's certification of its correctness to the appellate court, and, as noted below, had no opportunity thereafter to utilize the transcript himself during the appellate process when he was without counsel.

Petitioner's court-appointed trial counsel withdrew after the trial, and when the appellate court appointed new counsel to represent petitioner for his appeal, petitioner had no transcript to make available to his counsel. Instead, his appellate counsel, who was unfamiliar with the trial proceedings, was forced to prepare his brief on appeal by borrowing the transcript from his opponent, the California Attorney General (A. 18). Subsequently petitioner's appellate counsel was, upon his own request, relieved as counsel prior to determination of petitioner's appeal (A. 11, 41). Thereafter the District Court of Appeal on August 17, 1961, affirmed petitioner's conviction in an unpublished opinion. Petitioner—who was then without counsel—had no access to the transcript, for the purpose of filing a petition for rehearing with the appellate court or a petition for hearing in the California Supreme Court, and no further steps were taken by him at that time to review his conviction.

Commencing in 1965, petitioner filed a series of petitions, as an indigent, with the trial court, the District Court of Appeal, which affirmed his conviction, and the California Supreme Court unsuccessfully seeking a copy of his transcript. The District Court of Appeal denied his request "for the reason that your case is long since final and this office is possessed with only the original record and have no method of duplication" (A. 22). The California Supreme Court thereafter denied a similar request set forth in a petition for habeas corpus on the sole ground that it should have been directed to the District Court of Appeal possessed of the original record, which court had already advised petitioner that it had no method of duplicating the transcript (A. 27). The District Court of Appeal subsequently advised petitioner that his transcript could indeed be duplicated pursuant to whatever arrangements as to reproduction petitioner might choose (A. 28). The trial court similarly advised petitioner that he could obtain a copy of his transcript by making his own financial arrangements directly with the court reporters who had reported his trial (A. 29).

Petitioner thereupon filed an in forma pauperis petition for a writ of habeas corpus with the United States District Court for the Northern District of California, alleging that he was being denied due process and equal protection of the law because the State of California had failed to furnish him, as an indigent, a free copy of his trial transcript in connection with his appeal (A. 3, 19). On February 15, 1967, the United States District Court issued an order to show cause why the writ of habeas corpus should not issue (A. 31) and, following a hearing, on June 5, 1967, issued an order granting the petition, noting that petitioner had

exhausted his stated remedies, and ordering that petitioner be released from custody unless the State provided him a transcript (A. 44).

The State appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court on the ground that petitioner was not entitled to a transcript unless he first demonstrated errors in his trial which would warrant the granting of post-conviction relief.

Summary of Argument

A. Rules 10 and 35 of the California Rules of Court both by their terms and as applied in this case have deprived petitioner of due process and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

1. By furnishing a free transcript for the purpose of appeal to every person who is tried separately in a felony case irrespective of the penalty imposed, but denying a free transcript to a person such as petitioner who is tried with one or more co-defendants in a felony case, unless one of the defendants is under sentence of death, the State of California has denied petitioner equal protection of the laws.

2. By furnishing a free transcript for the purpose of appeal to persons who are tried separately in felony cases and to persons who are co-defendants where one or more co-defendants are under sentence of death, but requiring co-defendants in other cases to pay for their transcripts, the State of California has interposed an unconstitutional barrier to the use of its criminal appellate procedures by indigents such as petitioner.

3. Even if Rules 10 and 35 of the California Rules of Court do not by their terms violate the Fourteenth Amendment to the United States Constitution, they have been applied in this case so as to deprive the petitioner of the equal protection of the laws.

B. Having been deprived of his trial transcript for use in connection with direct appeal of his conviction, petitioner is not required to set forth the specific grounds for attacking his original conviction as a condition precedent to obtaining the transcript in a Federal habeas corpus proceeding.

1. The decisions of this Court recognize that a defendant need not set forth specific grounds for reversal of his conviction as a condition precedent to obtaining a copy of a transcript.

2. To condition petitioner's right to a transcript on a showing of grounds for reversal of his conviction would deprive petitioner of due process and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

A.

Rules 10 and 35 of the California Rules of Court, Both by Their Terms and as Applied in This Case, Have Deprived Petitioner of Due Process and the Equal Protection of the Laws in Violation of the Fourteenth Amendment to the United States Constitution.

1. Rules 10 and 35 Create an Irrational Discrimination Based Solely on Whether a Defendant Is Tried Separately or With a Co-Defendant.

Rules 10 and 35 of the California Rules of Court, by their terms, require the State of California to furnish a free transcript in connection with an appeal to every defendant, whether indigent or not, who is tried separately in a criminal proceeding in a Superior Court. Superior Courts have jurisdiction over all felony cases. California Constitution, Article VI, § 10. Thus, by way of example, a defendant who has been convicted of the felony of fraudulently selling securities (Cal. Corps. Code § 25541), and has been fined $5,000 but not sentenced to confinement is entitled to a free transcript at the State's expense in connection with his appeal even though he is a millionaire and clearly able to pay for his transcript. On the other hand, Rules 10 and 35 by their terms deny a defendant who has been tried with a co-defendant, convicted of murder, and sentenced to life imprisonment, the right to a free transcript even if he is an indigent unless his co-defendant has been sentenced to death.[1] The entitlement to a free transcript for purposes

[1] The most that such a defendant can hope for is that the trial judge or his clerk will make the record available to him on some limited basis.

of appeal in California may therefore turn on the wholly fortuitous circumstance as to whether a defendant is tried separately or with a co-defendant, irrespective of the type of crime involved, or the severity of the sentence imposed, and irrespective of the defendant's financial ability or inability to pay for the transcript.

Such a basis of classification bears no rational relationship to the constitutionally recognized objective of insuring that persons convicted of crimes have the transcripts of their trial proceedings available to them for the preparation of their appeals, particularly where, as here, a transcript is available (see, *Long* v. *District Court of Iowa,* 385 U.S. 192; *compare Gardner* v. *California,* 393 U.S. 367). Furthermore, here it may be within the power of the State prosecutor to choose whether a defendant will be entitled to a transcript if he is convicted, since the prosecutor initially may determine to try defendants separately rather than as co-defendants.

Although a state has no constitutional obligation to afford an appellate procedure in criminal cases (see, *McKane* v. *Durston,* 153 U.S. 684, 687-8), once it makes such a procedure available it must insure that the procedure operates in a fair and rational manner and does not unfairly discriminate against any particular class of defendants to whom the procedure is made available. (See, *Griffin* v. *Illinois,* 351 U.S. 12; *Douglas* v. *California,* 372 U.S. 353; *Williams* v. *City of Oklahoma City,* 37 Law Week 4524.) Therefore, even putting aside for the moment the question as to whether Rules 10 and 35 unconstitutionally discriminate against indigents, such Rules clearly discriminate

against persons who have the misfortune to be tried with co-defendants rather than separately, and for that reason alone Rules 10 and 35 create that sort of irrational discrimination which this Court has consistently viewed as violating the Fourteenth Amendment (see, *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-9).

This discrimination becomes even more unsupportable in view of the California practice of extending the right to a free transcript to indigent defendants in *misdemeanor* cases where a transcript has been prepared and is necessary for an adequate and effective appellate review (see, *In re Henderson*, 61 Cal. 2d 541, 39 Cal. Rptr. 373).

2. Rules 10 and 35 Unfairly Discriminate Against Indigent Defendants.

The unfair operation of Rules 10 and 35 becomes even more apparent when applied to indigent defendants such as the petitioner in the instant case. If petitioner had been tried separately from his co-defendant Pollard (with whom he alleged he had a conflict of interest), he would have been entitled to a free transcript on appeal as a matter of right irrespective of the severity of the penalty imposed upon him. However, because he was tried with a co-defendant, he was thereby denied the right to his own free transcript even though he was tried and convicted of a serious felony and sentenced to life imprisonment. Furthermore, a copy of the transcript was furnished to his co-defendant, who refused to share it although he had dismissed his own appeal. After his court-appointed appellate attorney withdrew from the case, petitioner had no chance—even if he had the ability to do so—to review the record and represent himself in his appeal from his conviction.

In recent years this Court has clearly recognized that "differences in access to the instruments needed to vindicate legal rights when based upon the financial situation of the defendant are repugnant to the Constitution" (see, *Roberts* v. *LaVallee,* 389 U.S. 40), and that the transcript of a defendant's criminal proceedings is one of those instruments to which such unfettered access must be accorded to indigent defendants. (See, *Williams* v. *City of Oklahoma City,* 37 Law Week 4524; *Gardner* v. *California,* 393 U.S. 367; *Roberts* v. *LaVallee, supra; Long* v. *District Court of Iowa,* 385 U.S. 192; *Draper* v. *Washington,* 372 U.S. 487; *Lane* v. *Brown,* 372 U.S. 477; *Smith* v. *Bennett,* 365 U.S. 708; *Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U.S. 214; and *Griffin* v. *Illinois,* 351 U.S. 12.)

In *Griffin* v. *Illinois,* 351 U.S. 12, this Court first considered the extent to which an indigent defendant should be constitutionally afforded the right to a transcript in connection with his appeal of a conviction in a state court. The State of Illinois provided appeals as of right to all criminal defendants, but only indigent defendants sentenced to death were given a free transcript; all other defendants either purchased a transcript for appeal or went without. This Court held that denying indigents equal access to the appellate process violates their rights under the Fourteenth Amendment.

The importance of the case rests not only on the holding. In *Griffin,* this Court established the yardstick by which to measure all future distinctions between monied and indigent defendants on appeal. Thus, Mr. Justice Black highlighted the appropriate standards in his opinion:

"... our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' Chambers v. Florida, 309 U.S. 227, 241. See also Yick Wo v. Hopkins, 118 U.S. 356, 369." (351 U.S. at 17.)

"There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g.*, *McKane* v. *Durston*, 153 U.S. 684, 687-688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." (351 U.S. at 18.)

Mr. Justice Black then described a state's denial of a trial transcript to indigents as "a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law .... Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." (351 U.S. at 19.)

Mr. Justice Frankfurter emphatically endorsed these statements:

> "But neither the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a State to lay down conditions its deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorizes the imposition of conditions that offend the deepest presuppositions of our society." (351 U.S. at 21-22.)
>
> "• • • If it [a state] has a general policy of allowing criminal appeals, it cannot make a lack of means an effective bar to the exercise of this opportunity." (351 U.S. at 24.)

Petitioner's case here is remarkable not because it is unusual, but because today, more than thirteen years after enunciating the controlling principles and applying them to the facts in *Griffin,* this Court is asked to review an almost carbon copy of that seminal case. Indeed, the only difference between *Griffin* and the instant case is that in *Griffin* two indigent co-defendants appealing jointly were denied a transcript, whereas in this case one indigent co-defendant appealing separately has been denied a transcript. Illinois' denial of a free trial transcript was a blanket rule for all indigent appellants, whereas California's Rule 35(c) denies a free transcript only to those indigent appellants who are jointly tried and who are unfortunate enough not to be the one chosen by the clerk of the Court to receive the one transcript provided to co-defendants. There is no more

rational basis for the narrow discrimination practiced by California than there was for the broad discrimination practiced by Illinois thirteen years ago. Nor, it should be added, are constitutional rights protected only from broadly applicable denials. Indeed, California's discrimination is more invidious than Illinois' because it is capricious and provides for discrimination between indigents as well as between rich and poor.

In the years since *Griffin*, this Court has consistently recognized the importance of a transcript for the effective presentation of an indigent defendant's case for review by an appellate court. See *Eskridge* v. *Washington State Board of Prison Terms and Paroles, supra; Draper* v. *Washington, supra; Smith* v. *Bennett, supra; Lane* v. *Brown, supra; Long* v. *District Court of Iowa, supra; Roberts* v. *LaVallee, supra; Gardner* v. *California, supra; Williams* v. *City of Oklahoma City, supra.*

As recently as this Term, this Court had two occasions to again reconsider the importance of a transcript to an indigent defendant. In *Gardner* v. *California, supra,* this Court stated (393 U.S. at 370):

> "(P)etitioner carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions from the facts deduced were erroneous. A transcript is therefore the obvious starting point for those who try to make out a case for a second hearing. The State can hardly contend that a transcript is irrelevant to the second hearing, where it specifically provides one, upon request, to the appellate court and the State attorney. So long as this system of repeated hearings

exists and so long as transcripts are available for preparation of appellate hearings in habeas corpus cases, they may not be furnished those who can afford them and denied those who are paupers."

In *Williams* v. *City of Oklahoma City, supra,* this Court required the furnishing of a transcript necessary for an indigent defendant to be able to perfect an appeal from a misdemeanor conviction, noting that once avenues of appellate review are established these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

None of the decisions of this Court anywhere suggests that an indigent defendant should have any less entitlement to a transcript of his trial if he is tried as a co-defendant than as a single defendant. On the contrary, the decisions of this Court clearly require the conclusion that no such distinction be drawn. The overwhelming majority of the States of the United States have already come to the same conclusion. As indicated in the schedule appearing as Appendix B to this Brief, 39 of the 50 states recognize by statute or court rule or administrative practice that an indigent defendant in a felony case is entitled to a free transcript for purposes of appeal without drawing any distinction as to whether he is tried as a single defendant or with other defendants.[2] Only California, Georgia, Kentucky and New Mexico have statutes or court rules which expressly deny jointly tried co-defendants individual copies of their trial transcript for purpose of appeal. In addi-

[2] In thirteen of these states, some inquiry beyond the fact of indigency is provided for, thereby suggesting a possible conflict with this Court's decision in *Draper* v. *Washington,* 372 U.S. 487.

tion, the Attorneys General of three other states have advised counsel for petitioner that, as a matter of administrative practice, they presently construe their statutes or court rules (which in terms require furnishing of free transcripts to indigent defendants) not to afford each co-defendant a copy of the trial transcript, and, the Attorneys General of four other states have advised counsel for petitioner that the matter has not yet been resolved in those states. California is therefore in the distinct minority of states which do not afford an indigent co-defendant in a felony case a copy of the transcript of his trial for his own unrestricted use in preparing his appeal.

The cost of providing equal justice to all should not be a legitimate concern in determining whether it is to be provided. Even if it were, the requirement that each indigent co-defendant in a felony case be furnished a copy of the transcript of criminal proceedings should not impose an undue economic burden on the State of California. As indicated in the study made by the Bureau of Criminal Statistics of the California Department of Justice attached to this brief as Appendix C, based on a sampling of 11,005 criminal cases filed in Superior Courts in the State of California in 1968 (representing 20-25% of the total criminal cases filed in that year), 1,425 cases, or only 12.9% of the total, included two defendants, 296 cases, or 2.5%, included three defendants, and 141 cases, or 1.2%, included four or more defendants.[3]

[3] Although statistics are not available as to the number of these multiple defendant cases which involved indigents, the Bureau of Criminal Statistics has advised that of 17,268 defendants convicted in the Superior Court in Los Angeles County in 1967, 9,506 were defended by the Public Defender, 7,104 by private attorneys, 490 by court-appointed private attorneys, and 168 were not represented by an attorney.

Since under Rules 10 and 35 a minimum of three copies of the transcript are required to be prepared in any event, little added burden should be imposed by the requirement that each indigent co-defendant be furnished a copy of the transcript. In the overwhelming percentage of co-defendant cases, only one co-defendant is involved, and one additional copy of the transcript could easily be prepared at the time of preparation of the first three copies. In the relatively small percentage of cases where a number of additional copies would be required, or in lengthy trials where the preparation of one additional transcript by the reporter might be more costly, consideration can be given to adopting modern methods of duplicating documents. Even on a commercial basis, a copy of petitioner's trial and clerk's transcripts in this case (which are approximately 800 pages long) could be reproduced by a private reproduction service for approximately $80. If the State's own reproduction facilities are utilized, this cost could be substantially reduced to no more than $40, and perhaps even less, depending upon the type of reproduction facilities utilized. Even this modest cost might be recouped by the State of California if it chose to require persons who are financially able to do so to pay for their transcripts, and to require indigents who are furnished free transcripts to reimburse the State for their cost on a non-discriminatory basis. See, *Rinaldi* v. *Yeager,* 384 U.S. 305.

The hidden cost of *failure* to provide transcripts to indigents has been clearly pointed out by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice in considering the federal practice with respect to making transcripts available as follows:

The Committee believes that proper evaluation of comparative costs requires that attention be directed to the "hidden costs" of the present system. First there are the costs in judicial time in the district courts and courts of appeals, just noted, that result from the administration of the present system. Second are the costs in the time of public officials required to be interviewed by assigned counsel in his effort to establish a record or to justify the ordering of a transcript in proceedings involving leave to appeal *in forma pauperis*. Third are the costs of time, effort, and expense of assigned counsel. The present system is able to function at all only by shifting a large part of the burdens of the system on lawyers who are required to serve without compensation or reimbursement. It should be carefully noted that in a system of adequate representation involving the use of compensated counsel the shifting of many of these burdens to counsel will no longer be possible. In many cases the provision of a transcript at the outset of the appellate process will involve substantially less expense to the government than the payment of attorneys' fees for time spent by counsel in an effort to settle a record for disposition of the application to appeal *in forma pauperis* and in other proceedings made necessary by the present system. Fourth, a system that obstructs access to direct review is likely to encourage resort by prisoners to collateral attack on their convictions and sentences with losses of time and money thereby occasioned. Such has been the uniform experience of state systems of criminal justice. We have already noted that one of the consequences of the liberal review procedures

in the administration of military justice has been the almost complete absence of collateral attacks on sentences imposed by courts martial. (Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), pp. 122-123.)

Essentially the same conclusion was reached in the recent Tentative Draft Report on Standards Relating to Criminal Appeals of the Advisory Committee on Sentencing and Review under the American Bar Association Project on Minimum Standards for Criminal Justice, where it was concluded that methods should be adopted in preparation of records for appeals that will minimize the cost of preparation in terms of money and time, and at the same time defendants appealing in forma pauperis should be supplied transcripts at government expense. (See, Tentative Draft on Standards Relating to Criminal Appeals, American Bar Association Project on Minimum Standards, §3.3, pp. 83-91 (1969).)

3. Rules 10 and 35 Have Been Administered in a Fashion Which Denied Petitioner His Constitutional Right to a Transcript.

Even if this Court were not to declare Rules 10 and 35 unconstitutional on their face for the reasons set forth above, this Court would be justified in concluding that the manner in which the Rules have been applied to petitioner in this case have denied him the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. Even if a statute be fair on its face, if it be administered with an evil eye and an unequal hand,

it may result in a denial of equal protection (see, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74). Rule 10(c) of the California Rules of Court requires that even in multiple defendant cases—where each defendant is not entitled to his own copy of the transcript as a matter of right—that one copy "shall be made available for the use of the parties to the appeal in such manner as the judge, or the clerk under his direction, shall prescribe."

In the instant case, neither the trial judge nor his clerk made any effort to insure that the transcript would be fairly shared by petitioner and his co-defendant Pollard. Indeed, the transcript was sent to Pollard alone, and Pollard thereafter refused and still refuses to make the transcript available to petitioner. Where the State of California neglects to enforce its own rules so as to require co-defendants to share transcripts where it has denied them their own transcripts, it must, as a matter of basic fairness, make a duplicate transcript available to the co-defendant who has been denied the opportunity to review his transcript. Failure to do so constitutes an obvious denial to petitioner of equal protection.

The State cannot be heard to contend that the standard of equality established by this Court in *Griffin* and the cases which have followed it is satisfied by lending the prosecution's copy of the trial transcript to the defendant's appellate counsel for a limited period of perusal as a matter of administrative grace. Such an arrangement—dependent solely on the discretion of the prosecutor as to times at which and circumstances under which a defendant or his counsel may inspect the transcript—certainly cannot be said to afford an indigent the same rights as a defendant

who can pay for his transcript. This Court has in the past recognized the many burdens imposed upon court-appointed counsel for indigents, and the necessity for furnishing such counsel with easy access to complete trial transcripts. (See, *Hardy* v. *United States,* 375 U.S. 277, and Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783, 792-93 (1961), and the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), p. 114, quoted from extensively in the majority and concurring opinions in that case.) Furthermore, the procedure of lending a transcript to petitioner's court-appointed appellate counsel gave the petitioner no opportunity to object to errors in the transcript before it was certified correct by the trial judge, nor did it give him access to the transcript after his appellate counsel had withdrawn from the case—either to prepare his own petition for rehearing or for a hearing before the California Supreme Court.

Thus, in summary, it is clear that the lending of a transcript in the manner afforded in this case deprives an indigent defendant of a number of advantages available to one who can afford to pay for a transcript, including, among others:

(1) The ability to review and object to the accuracy of the transcript before it is transmitted to the appellate court.

(2) The unrestricted access to the transcript in preparing his case on appeal, including preparation of a reply brief.

(3) The availability of the transcript for preparation of a petition for rehearing or for hearing before the California Supreme Court.

As stated by this Court in *Draper* v. *Washington*, 372 U.S. at 496: "the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a non-indigent defendant with similar contentions." This the temporary lending of a transcript clearly does not do.

B.

Having Been Denied a Trial Transcript for Use in Connection With His Appeal, Petitioner Is Not Required to Set Forth the Specific Bases for Attacking His Original Conviction as a Condition Precedent to Obtaining the Transcript in a Post-Conviction Proceeding.

1. The Decisions of This Court Recognize That a Defendant Need Not Set Forth Specific Grounds for Reversal of His Conviction as a Condition Precedent to Obtaining a Copy of a Transcript.

As heretofore indicated, petitioner has been unconstitutionally denied the right to a transcript for the purpose of direct review of his conviction. But this is not petitioner's sole basis for claim to a transcript. He is continuing to be denied a transcript for purposes of obtaining meaningful post-conviction review of his original state conviction. As to this later basis for claim, there is no need to first show grounds for reversal of his original state conviction before becoming entitled to a transcript.

The decisions of this Court make clear that an indigent defendant's constitutional right to demand a transcript is not confined to proceedings related to review of his initial direct appeal of his conviction, but extends as well to post-

conviction proceedings—at which time he may demand and be entitled to receive a transcript related to his initial proceedings without the necessity of first setting forth specific grounds for reversal of his conviction. (See, *Lane* v. *Brown*, 372 U.S. 477 (1963); *Long* v. *District Court of Iowa*, 385 U.S. 192 (1966); *Roberts* v. *LaVallee*, 389 U.S. 40 (1967).)

Indeed, in *Lane* v. *Brown, supra,* although the indigent defendant alleged four substantive grounds for attacking his conviction, the courts found it necessary to examine only his claim that he had been denied a transcript.

The Court of Appeals in this case concluded that to give petitioner a copy of the transcript at this stage in the proceedings without any prior showing by him of errors in the proceedings which led to his conviction would simply be permitting him to comb the record in the hope of discovering some flaw, and this he should not be permitted to do.

The Court of Appeals felt that it had support for this position in certain federal court decisions dealing with the entitlement of an indigent defendant in the federal courts to a transcript. However, this Court has construed the statutory provisions which presently govern the rights of an indigent in the Federal courts to a transcript (28 U.S.C. §§753(f), 1915) to require the furnishing of a free transcript to an indigent defendant unless the Government sustains the burden of showing that an appeal is so lacking in merit that the appellate court would dismiss the case as frivolous on the Government's motion had the case been docketed and had a record been filed by an appellant able to pay the expense of complying with these requirements, *Coppege* v. *United States*, 369 U.S. 438. See also, *Ellis* v.

United States, 356 U.S. 674. Indeed, when, as here, new counsel has been appointed to represent an indigent on appeal, this Court has construed these statutory provisions to require the furnishing of a complete transcript to the new counsel so that he can properly carry out his duties as advocate for his client. *Hardy* v. *United States,* 375 U.S. 277. Certainly an indigent defendant, who has never himself seen the transcript of his trial, which occurred nine years ago, and who in addition has no counsel to assist him in reviewing the proceedings in his case should be entitled to no less.

It will not do to say that petitioner has already had adequate opportunity to review the transcript through his court-appointed appellate counsel. That counsel—who had not participated in the trial of the case—voluntarily requested permission to withdraw, from the case on appeal, and thereafter petitioner was not in a position to review the record himself for the purpose of prosecuting his own appeal or to take further steps to secure a rehearing or a hearing in the California Supreme Court.

Suffice it to say that this Court has as recently as this Term recognized the importance to a trained lawyer of a transcript in the preparation of an appeal, and the even greater importance of a transcript to a layman. In *Gardner* v. *California,* 393 U.S. at 369-70, this Court recognized the importance of a transcript of a prior proceeding to a layman in a de novo application, stating:

> "But we deal with an adversary system where the initiative rests with the moving party. Without a transcript the petitioner, as he prepared his application to the appellate court, would have only his own lay memory of

what transpired before the Superior Court. For an effective presentation of his case he would need the findings of the Superior Court and the evidence that had been weighed and rejected in order to present his case in the most favorable light. Certainly a lawyer, accustomed to precise points of law and nuances in testimony, would be lost without such a transcript, save perhaps for the usual and exceptional case. The lawyer, having lost below, would be conscious of the skepticism that prevails above when a second hearing is sought and would as sorely need the transcript in petitioning for a hearing before the appellate court as he would if the merits of an appeal was at stake. A layman *a fortiori* needs the transcript even more."

The necessity of making a transcript available to permit a meaningful review becomes obvious when it is recalled that the proceedings under review occurred nine years ago this fall. Even the best trained of lawyers would find it difficult if not impossible to review proceedings at such a remote date without the benefit of at least the transcript of the proceedings.

2. To Condition Petitioner's Right to a Transcript on a Showing of Grounds for Reversal of His Conviction Would Deprive Him of Due Process and the Equal Protection of the Laws.

To require petitioner to state grounds for reversal of his conviction as a prerequisite to obtaining a transcript of his trial would discriminate unfairly between two classes of defendants seeking to obtain for the first time free copies of their trial transcript—in the first instance for the pur-

pose of direct attack upon their state convictions, and in the other, for collateral attack upon such convictions.

More specifically, in California an indigent defendant tried alone and convicted of a felony becomes entitled to a free copy of his trial transcript merely by filing a timely notice of appeal. Such a person need not set forth grounds for reversing his conviction or any grounds at all; as stated, his trial transcripts become his property automatically. By contrast, a defendant such as petitioner, who has not obtained a free copy of his trial transcript prior to seeking collateral review, but is still in the identical position of seeking to obtain these transcripts for the first time, would, according to the Court of Appeals below, be required to state grounds for reversal of his conviction before free transcripts would be provided. The result would be, in a state such as California, that defendants such as petitioner would be discriminated against by the state vis-a-vis defendants seeking transcripts for direct review.

The discrimination between indigent defendants described above is not, however, the only kind of discrimination arising from the conditioning of free transcripts to a defendant (seeking to collaterally attack his conviction) upon his stating grounds for reversal of conviction. Another form of discrimination by the state, of perhaps a more invidious nature, is that between indigent defendant and monied defendants, both of whom are seeking to collaterally attack convictions. The latter group may purchase their trial transcripts by providing nothing more than the purchase price. Armed with their transcripts and ordinarily represented by counsel, the monied defendant may then proceed with the difficult task of seeking reversal of

his conviction by the collateral proceedings established by state law.

The indigent defendant pursuing collateral attack, on the other hand, is without the aid of court-appointed counsel.[4] In this posture he is told by the State that a different rule for transcript access applies to him than for a monied defendant: The indigent defendant must set forth grounds for reversal of his conviction before transcripts will be made available. It is precisely this kind of discrimination that this Court has heretofore struck down. (See *Draper* v. *Washington, supra; Eskridge* v. *Washington State Board of Prison Terms and Paroles, supra; Lane* v. *Brown, supra.*)

Conclusion

As has been recognized by this Court, "No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal procedures. The methods we employ in the enforcement of our criminal law have been aptly called the measures by which the quality of our own civilization may be judged." *Coppege* v. *United States,* 369 U.S. 438, 449.

The furnishing to an indigent defendant of a copy of the transcript of the proceedings taken against him has been

[4] Since an indigent defendant can file an indefinite number of successive writs of habeas corpus to collaterally attack the conviction it may not be feasible to provide him with free counsel in filing such petitions. A similar argument certainly cannot be made with respect to providing an indigent defendant with a free trial transcript at least once for purposes of attacking his conviction.

recognized by this Court as a necessary part of any proceeding which can be characterized as fair. The burden on Government of furnishing such a transcript is minimal at best, particularly in view of the techniques of high-speed, low-cost document reproduction which are now available. Any society which views itself as truly free can afford such a minimal burden.

The decision of the Court of Appeals for the Ninth Circuit should be reversed and the case remanded with a direction that the writ of habeas corpus issue on condition that it be set aside if the State of California forthwith furnishes petitioner with a copy of the complete transcript of the proceedings in his case to date and the opportunity for a new appellate review of his original conviction in the state courts.

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